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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

Nos. 172 and 173.

GEORGE A. COLE, ET AL.,
Petitioners,
vs.
JOSEPH RALPH,
Respondent.

MEMORANDUM FOR RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MEMORANDUM FOR RESPONDENT.

We have leave to file a memorandum to certain statements in the reply brief and to certain of petitioners' statements in closing the argument.

PARTIES PLAINTIFF.

Lack of interest in some of the plaintiffs in the Guy Davis location was *not waived* by our offering evidence. There was a failure by plaintiffs to prove the averment of joint interest alleged in the complaint, and no evidence by defendant supplied the omission. It

was also a misjoinder of plaintiffs which is fatal under the Nevada statute and practice (see Exhibit A, pp. 60-61), which is binding upon the Federal Court sitting in that State in actions at law. The defect arose upon plaintiffs' own evidence at the trial, and was challenged by our request for a directed verdict and our exceptions to the verdict and judgment.

In the Homestake case none of the plaintiffs have an interest, but if their arguments were true in any particular, the above considerations would apply. This is only one out of many fatal errors at the trial, and the failure of the Circuit Court of Appeals to mention them all is not a decision against them as claimed.

They say in avoidance that Cole, Malley, Ross and Healey were in by the deeds "A-2" and "A-5" delivered at the eve of the trial. But error is assigned to these deeds for lack of revenue stamps. The cases they cite on this point (p. 12, reply brief) are State decisions and inapropos. It has very commonly been held by State courts that Congress could not prescribe a rule of evidence for the State courts in such matters. But the Circuit Court of Appeals for the Ninth Circuit has correctly held that Federal courts must observe and enforce the Acts of Congress which require revenue stamps (Sackett vs. McCaffery, 131 Fed., 219). This decision was binding on the Federal District Court for Nevada, and its refusal to so rule was error.

They say that proper stamps were affixed before the deeds were admitted, but an inspection shows they are not even now properly stamped, but have a ten-cent stamp upon each, whereas the lowest denomination allowed upon any deed was 50 cents. (See Act of 1914 on p. 605 of Exhibit A.) They say the consideration was only $10, but the act says *consideration or value*,

and they testified the placer values alone are $100,000 or more (Rec., p. 340).

In respect to the Homestake, we showed before that John J. Healey, one of the two Homestake jumpers on the Midas and Evening Star, had conveyed away his one-half interest therein to Lillian V. Healey, which she never thereafter reconveyed to petitioners. But they say there was a power of attorney from her to John J. Healey to convey. Healey never exercised this power, nor made any conveyance under it. His own contract employing Thatcher and Forman as attorneys was before the Healey deed to his wife, but was never recorded, and was cut out by the record of the Healey deed to his wife.

They suggest the John J. Healey one-half interest was community property. If so, it ceased to be such upon the conveyance by him to his wife. Under the Nevada statute (C. L. 1912, sec. 2155) all property acquired by a wife by gift is her separate property, and by sec. 2163 she may charge, encumber or dispose of it as if she were sole. By sec. 2173 either husband or wife may make and enter contracts or other transactions with each other or with others as if unmarried. And by Secs. 2155 and 2162 husband or wife may have or hold both community and separate property and by joint tenancy. The accepted rule in the community property states (derived from the civil law) is that the husband may convey to his wife either for a consideration or as a gift, his interest in the community property, and it thereupon becomes her separate estate and loses its community character (21 Cyc. 1664, notes 42-43, and p. 1665, notes 46-47-48, and 1901-1919 Cyc. annotations, with numerous citation of cases). So that John J. Healey no longer has an interest to justify his

presence in case No. 172. And his interest had so ceased before the adverse in the Land Office, so he could not join therein nor begin suit to enforce such non-existing interest. Neither had Thatcher or Forman an interest to support the adverse or suit, because as stated, their prior contract with Healey and Scott was only one of employment and not a conveyance, whatever they might elect to call it. They bargained for 10 per centum of whatever free gold their clients might get out of the ground, in return for which they would defend them in injunction suits and contempt proceedings brought to prevent or punish them. And even if it could be treated as a deed it was eliminated as such by the record of Healey's deed of the premises to Lillian V. Healey on May 5, 1914, for all his interest. This record cut out prior unrecorded conveyances as well as Healey's claim of right to take gold out of the ground, even for so laudable a purpose as dividing up with his attorneys. The grantee, Lillian, was in turn eliminated by her failure to file an adverse in the Land Office or begin suit to enforce it (U. S. R. S., sec. 2325-2326).

And as to the other one-half interest, it is true as claimed, that on the date of the adverse, Sept. 24, 1914, Murray Scott still owed one-half of whatever the Homestake location amounted to, and his interest continued till expiration of his six months' right of redemption on Jan. 5, 1915. But his interest did then lapse and terminate, and with it all right to further prosecute the adverse suit. The Verdi Lumber Company as holder of the sheriff's certificate of purchase, also had such an interest as entitled it to file an adverse during the whole period of publication of the adverse notice in the Land Office, to wit, 60 days from

Aug. 1, 1914, as we showed before. Its failure to do so caused its rights to lapse, and it had nothing to assign to Reber in January following. As Reber received nothing, he had nothing to convey to Cole, Malley, Ross and Davis on the opening day of the trial. Besides, the latter deed was without necessary revenue stamps. We repeat that none of the petitioners are interested in or have a right of action under the Homestake location. Our request for peremptory instruction should have been granted.

It is not true as argued on page 7, their reply brief, that where one of two plaintiffs has no interest, he may be dropped or disregarded without prejudice to the other in an action at law. That was the old rule in equity cases, but not at law, and does not now obtain even in equity under the Federal Equity Rules as we have shown. But this is an action at law. We have answered their citation of Nesbit vs. Delmar before. It is true as held in Erhart vs. Boaro, that one part owner or tenant in common may sue a trespasser alone, but this does not mean that he may unite with a stranger and still succeed at law.

Their cases (bottom, p. 7) only hold that a plea is necessary where the defect of interest is to be shown by defendant, not where it appears by plaintiffs' own evidence.

RELOCATION.

They suggest (p. 8) that the Davis lode claim was never perfected and no work done under it. The contrary is shown by their testimony cited to the record in Exhibit A, pp. 316-317, where the only location work they ever did was before Sept. 5, 1913—a 4 x 6 x 10 hole in the hillside at point 8 on the map of the claims

(fly leaf our trial brief), where no placer values were ever contended to exist by any testimony at the trial. It was a lode location in thought and intent, with name, area (1,500 x 600 feet) in excess of 20 acres, and form of location notice to correspond. And it was never abandoned, but was retained and amended (their reply brief, p. 8), with area of lode claim and date of location, September 5th, still retained, with location of discovery point and size and description of location discovery work retained as before. The only change was in the name, to "Guy Davis placer." And both original and amended notices were put in evidence together by plaintiffs as part of their proof and claim of title. There was no intention to abandon the first notice.

And as matter of law, an amendment is not an abandonment of the original but a retention thereof. See cases cited in our brief, Exhibit A, page 93. They could not retract the admission of relocation in their original if they would, because it had become an estoppel of record, with its consequent admission of validity of the prior Salt Lake No. 3 and consequent invalidity of their relocation. In law they were thereby constituted trespassers and attempted appropriators of mineral already discovered by respondent.

There is no such avenue of escape as suggested, *i. e.*, that petitioners attempted to relocate as a placer, and not as a lode. Besides, it is the fact of relocation of record, not the character of relocation, that constitutes the admission and estoppel against them. See our cited cases (Exhibit A, pp. 69-78).

They speak of *posted* notices (p. 10). They were recorded and became muniments of title, or lack of title. So say our cases.

COMPLAINT.

Their citations on reply brief (p. 11) are no answer to the holding of this Court in Hammer vs. Garfield Mining Co. and Lockhart vs. Farrell, cited by us, and accompanying cases, that an affirmative issue of no discovery or other invalidity is necessary for a junior locator to invalidate a senior location by proof at the trial. This and the Yellow Jacket wrangle were afterthoughts, suddenly sprung on us at the trial, and were never thought of when the complaints were drawn.

DISCOVERY.

It is not true as stated (reply, p. 13), that plaintiffs offered an abundance of evidence or any evidence to establish absence of veins or lodes at the time of the relocation, or at any time. Their witnesses testified they went over the ground and saw no lodes or veins, or what they would consider to be such, but immediately retracted on cross-examination or in chief by saying they saw fissures, breaks, slips, fractures, faults and veins containing material of different character and some mineralization upon each of our three lode claims. Of their own samples, one or two from each lode claim showed mineralization. And the balance were discounted by absence of any testimony that they were taken from the veins but only that they were from the cuts. The question presented upon a challenge to the evidence as this Court held in Coughran vs. Bigelow (64 U. S., 308, 41 L. Ed., 446), is not whether there was literally no evidence or testimony, but whether there is any upon which the jury can lawfully proceed to render a verdict in favor of the party having the burden of the issue. Their own testimony showed

there were veins within the holding of this Court in Mining Co. vs. Cheeseman (Exhibit A, pp. 199-200), and their demand for pay ore was nugatory. The fact that respondent's witnesses obtained $11 or $12 assays shows that the original locators may have taken much higher assays from still other points on the veins. What assays were taken by Clive and Farren originally is not shown in evidence, and their workmen, the Jory's and Jurey, were only employed to post and monument the ground, not to take assays.

It is not true as stated, that we were permitted to introduce evidence of exposures and discoveries made from the time of the lode locations to the time of the trial. On over a hundred record pages is the impress of the trial court's rulings, obliging defendant to assume the burden of showing his own or his witnesses' knowledge of veins they desired to describe, unless it could be testified that he or they knew of such veins before September, 1913. And when we were refused leave to insist that plaintiff's own witnesses tell all they themselves knew or observed about the lodes and veins at the time they went on the ground for the purpose of acquiring evidence with which to destroy and invalidate the lode claims, they can not correctly say we were allowed all evidence of discoveries to the time of trial. What they mean is, that at the close of the trial plaintiffs weakened and began to fear their own record and procured rulings, to the extent of letting in our assays. But the assays emasculated as they were and stripped of all explanatory and identifying testimony necessary for the jury to understand and apply the same, did little to heal the grave injury defendant had received by the exclusion of much evidence of the veins themselves throughout the

trial. The admission of the assays could not resurrect that testimony and place it before the jury. Even the court's language in admitting assays belatedly, (Rec. p. 1160) was a practical instruction to the jury to distrust the same, and served to reinforce the unfavorable impression on the jury of rulings made throughout the trial. The issue of discovery was not fairly presented to the jury as claimed by petitioners.

CLOSING ARGUMENT.

In closing, members of this Court asked petitioners' counsel certain questions which were inadequately or inaccurately answered. He was asked in substance whether the jumpers entered quietly and peaceably on the ground when they attempted to locate the Homestake and Davis claims. He replied there was no opposition thereto, and that injunctions were only started a couple of months later. The record does not show this to be a fact. Respondent Ralph was a resident of Salt Lake City several hundred miles away. He had an agent and custodian on the ground residing in one of the houses on the Salt Lake No. 3, with duties to look after, care for and protect all the claims in the Canyon group, including the Midas and Evening Star, not the Salt Lake No. 3 alone, as answered by counsel; and to keep up the boundary monuments. Active work with a large number of men had only been suspended a few months pending certain necessary financial adjustments. Where this agent was at the time of the jumping the record does not show, and the writer does not know. But any inference that the entry and jumping were peaceable is untenable because Guy Davis was either in jail or had just emerged therefrom, where he had been serving his time for contempt of the

Federal Court at Carson City for violating its injunction against going on the Salt Lake No. 3 ground. He had been burrowing under the Salt Lake No. 3 side line up to that time and taking out placer gold. The injunction being still in effect, and in violation thereof, he and Faubert his partner caused the pretended Davis lode claim to be located on top of the Salt Lake No. 3, setting stakes down side by side with the stakes of the Salt Lake No. 3, and recorded their notice reciting relocation of the Salt Lake No. 3 aforesaid. New injunction suits became necessary to restrain acts of new parties locating both the Davis claim and the Homestake, and injunctions were issued in about 60 days. This terminated all open attempts at mining these rich placer deposits, but the latter have suffered grievously by the acts of unknown persons entering at night times and all times from the original hole opened by Guy Davis in the Canyon within about three feet of the west side line of the Salt Lake No. 3 before the injunctions were put in force, and since maintained by him and others against all protests and efforts to abate the same.

The injunction suits went to trial in the Federal Court at Carson City, Nevada, upon an issue in the answers of no prior discovery in the Salt Lake No. 3, Midas and Evening Star locations. After a hearing upon the merits the trial Court found as a fact that sufficient and valid lode mineral discoveries had been made on each of them by Respondent's grantors, and that the locations were valid. But the Court undertook to divide the ground between the contending parties by pulling in our west side line on one or more of the lode locations, giving the jumpers the bottom of the Canyon where the rich values are, or a great por-

tion thereof. Neither side was satisfied with this decision; it was set aside on stipulation of counsel, by which the cases were to be held without further trial, and final decrees agreed to be entered ultimately in conformity to the final judgment that shall be entered in these adverse suits. Meantime the injunctions were continued in force, but made to enjoin the respondent as well as the trespassing petitioners. So that while these suits have dragged their course, respondent has been prevented from working his own property, but it has remained at the mercy of secret invasion and taking of gold by wrong-doers to the extent of many thousands of dollars, as the petitioners themselves admitted in certain affidavits filed by them in the Federal Court in 1916.

Not all of these facts appear in the present records, but as the answers of petitioners' counsel at bar to questions by the court undertook to give a partial statement, and one partly incorrect, we have thought it proper to give the full account. The Court will thus have a clearer view of the whole situation.

This emphasizes our plea for a decision by this Court of the principal questions of law, so that in the necessary new trial, there will be as little open ground of contention as possible. The cost of this litigation and of attempts to protect the property on the ground has already covered a moderate fortune, over $30,000 we believe, and should these cases run another six years it is uncertain whether anything will be left to litigate about.

Respectfully submitted,

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